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Nos. 868, 967

In the Supreme Court of the United States

OCTOBER TERM, 1960

E. OTWAY DENNY, ET AL., APPELLANTS

v.

EARL BENJAMIN BUSH, ET AL.

THE LEGISLATURE OF LOUISIANA, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

MOTION TO AFFIRM

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 868

F. OTWAY DENNY, ET AL., APPELLANTS

v.

EARL BENJAMIN BUSH, ET AL.

No. 967

THE LEGISLATURE OF LOUISIANA, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

MOTION TO AFFIRM

Pursuant to Rule 16, the United States, as appellee *amicus curiae,* moves and suggests that the judgment of the district court be affirmed.

QUESTIONS PRESENTED

1. Whether the three-judge district court correctly held that three measures passed in extraordinary sessions of the Louisiana Legislature for 1960, which were clearly designed to interfere with orders of the district court to desegregate New Orleans public schools

Morse	Revercomb
Morton	Smith, Maine
Neuberger	Symington
Pastore	Thye
Potter	Watkins
Purtell	Wiley

NOT VOTING — 5

Bridges	Payne
Hennings	Schoeppel
Neely	

So the Anderson-Aiken-Case of South Dakota amendment was agreed to.

Mr. ANDERSON. Mr. President, I move that the Senate reconsider the vote by which the amendment was agreed to.

Mr. AIKEN. Mr. President, I move to lay on the table the motion of the Senator from New Mexico.

The VICE PRESIDENT. The question is on agreeing to the motion of the Senator from Vermont to lay on the table the motion of the Senator from New Mexico.

The motion to reconsider was laid on the table.

Mr. JOHNSON of Texas. Mr. President, the Senator from Wyoming [Mr. O'Mahoney] has at the desk an amendment designated "7-17-57-B," which I ask to have stated.

The VICE PRESIDENT. The amendment will be stated.

The CHIEF CLERK. At the end of the bill, it is proposed o add the following:

PART V

JURY TRIALS IN CERTAIN CONTEMPT CASES

Sec. 151. In any proceeding to impose criminal penalties or contempt of any injunction, restraining order, or other rder issued in an action or proceeding under this act, the ccused, upon demand therefor, shall be entitled to trial by ury which shall conform as near as may be to the practice n other criminal cases.

This section shall not apply to any proceeding for civil ontempt to enforce compliance with or remove obstruction o the carrying out of any injunction, restraining order, or ther order issued by a court under this act; but any person adjudged in civil contempt shall be entitled to be freed rom detention upon giving an appropriate undertaking hat he will in good faith comply with and not obstruct the arrying out of such injunction, restraining, or other order.

Mr. JOHNSON of Texas. Mr. President, the distinguished Senator from South Dakota [Mr. Case] has at the desk an mendment to correct certain typographical errors in the ill. The amendment is designated "7-16-57-D."

for trustees to handle the financial affairs of the Orleans Parish school board (Act No. 18); (3) to remove the Orleans Parish school superintendent from his duties as treasurer of the school board (Act No. 19); (4) to classify as malfeasance and as grounds for removal from office any move by a school board or any of its members to exercise their functions after being ordered to carry on a program inconsistent with state law (Act No. 21); and (5) to repeal provisions for the election of members of the Orleans Parish school board (Act No. 25). Other measures purported to dismiss both the Superintendent of Schools of Orleans Parish, James F. Redmond, and the school board's attorney, Samuel I. Rosenberg (House Concurrent Resolution No. 18), and to remove the Orleans Parish school board members from office for failing to abandon their duties in compliance with the above acts (House Concurrent Resolution No. 23). This legislative "package" was also struck down by a three-judge district court as patently unconstitutional. *Bush* v. *Orleans Parish School Board*, 188 F. Supp. 916 (E.D. La.), affirmed, 365 U.S. 569 (Nos. 589, 706, this Term).

After the three-judge district court had held the above acts unconstitutional, the legislature promptly convened a Second Extraordinary Session, at which the legislature reenacted the measures of the First Extraordinary Session abolishing the Orleans Parish school board in favor of a "legislature school board" and then amended these measures by creating another "new" Orleans Parish school board with members appointed by the Governor (Act No. 2). The legis-

lature also passed Act No. 5 (see Jurisdictional Statement, No. 967, App. B, pp. 44–47), which repealed the right of the Orleans Parish school board to select its own attorney and compelled the board to accept the Attorney General of Louisiana as its sole representative. Other measures passed at that time were designed to prevent the original Orleans Parish school board from financing the operations of the Orleans Parish schools (House Concurrent Resolutions Nos. 2, 23, 28). On December 21, 1960, these statutes were held unconstitutional, a temporary injunction was issued against the enforcement of all but Act No. 5, and a temporary restraining order was issued against enforcement of that Act. *Bush* v. *Orleans Parish School Board,* 190 F. Supp. 861 (E.D. La.), affirmed, 365 U.S. 569 (Nos. 589, 706, this Term), and *sub nom. New Orleans* v. *Bush,* May 8, 1961 (No. 812, this Term).[2]

On December 17, 1960, the day after the Second Extraordinary Session ended, the legislature started its Third Extraordinary Session. That Session enacted Act No. 4 (see Jurisdictional Statement, No. 868, App. B, pp. 51–58), which again purported to establish a new Orleans Parish school board. The members of that board, appointed in the statute itself, are the appellants in No. 868.[3] The Third Extraordinary Session also passed Senate Concurrent Resolution

[2] The validity of Act No. 5 was not raised in these appeals.

[3] One of the members of the legislature's school board, Robert L. Hickerson, did not join in this appeal.

The only member of the legitimate school board to be on the legislature's school board, Emile Wagner, is the only member of the school board to have opposed all compliance with the decrees of the federal courts.

No. 7 (see Jurisdictional Statement, No. 967, App. B, pp. 47–51), which removed Superintendent of Schools Redmond for continuing to exercise his office despite the previous attempts of the legislature to remove him.

On December 16, 1960, the United States, which had previously been requested and authorized by the district court to participate as *amicus curiae* with the right to file pleadings, arguments, evidence, and briefs, filed a petition to restrain the enforcement of Act No. 5 of the Second Extraordinary Session. As indicated above (*supra*, p. 5), the district court, consisting of Judges Rives, Wright, and Christenberry, granted a temporary restraining order. *Bush* v. *Orleans Parish School Board,* 190 F. Supp. 861 (E.D. La.). On January 13, 1961, the United States filed a petition to restrain the enforcement of Act No. 4 and Senate Concurrent Resolution No. 7 of the Third Extraordinary Session. After a hearing, the same three-judge district court granted temporary injunctions against all three measures. *Bush* v. *Orleans Parish School Board,* 191 F. Supp. 871 (E.D. La.).[4]

[4] The United States brought both actions against the Governor, the Attorney General, the legislature and its eight-man investigating committee (see *supra*, p. 3, note 1), the legislature's school board, and others. The eight-man legislative committee has also noted an appeal, but only the members of the legislature's school board (No. 868) and the legislature (No. 967) have thus far filed jurisdictional statements. Appellants in No. 868 have confined their appeal to the injunction against Act No. 4, while appellants in No. 967 are appealing the injunctions against all three measures.

ARGUMENT

1. Appellants contend (Jurisdictional Statement, No. 868, pp. 7–11; No. 967, pp. 15–21) that Act No. 5 of the Second Extraordinary Session of 1960 of the Louisiana Legislature and Act No. 4 and Senate Concurrent Resolution No. 7 of the Third Extraordinary Session are constitutional. These measures, however, are plainly invalid.

Act No. 4 of the Third Extraordinary Session purported to establish a new school board for the Parish of Orleans and to name the appellants in No. 868 as members of the new board. As appellants in No. 868 themselves recognize (Jurisdictional Statement, p. 9), the issue as to the validity of Act No. 4 is identical with that concerning the validity of Acts Nos. 17 and 25 of the First Extraordinary Session—which respectively conferred the functions of the Orleans Parish school board on the legislature and repealed state laws providing for the election of the Orleans Parish school board—and Act No. 2 of the Second Extraordinary Session—which replaced the Orleans Parish school board with a school board appointed by the Governor.[5] Like Act No. 4, the earlier statutes sought to displace the elected Orleans Parish school board and replace it with a body more cooperative with the legislature's policy of obstructing the orders of the district court. This Court decided the unconstitutionality of Acts Nos. 17, 25, and 2 when it affirmed

[5] Appellants in No. 868 do not specifically admit that the validity of Act No. 4 raises the same question as the validity of Act No. 17, but it is clear that Act No. 2 of the Second Extraordinary Session reenacted Act No. 17 of the First Session.

the order of the district court holding these statutes unconstitutional and enjoining their enforcement. *Bush* v. *Orleans Parish School Board*, 188 F. Supp. 916, affirmed, 365 U.S. 569. That decision is equally applicable here and is dispositive of this case.*

Act No. 5 of the Second Extraordinary Session and Senate Concurrent Resolution No. 7 of the Third Extraordinary Session attempt to remove the superintendent of schools and the attorney of the school board for Orleans Parish. In its First Extraordinary Session, the legislature attempted to remove these same two officials (House Concurrent Resolution No. 18). A three-judge district court, however, held that this resolution was unconstitutional and this Court affirmed. *Bush* v. *Orleans Parish School Board*, 188 F. Supp. 916, affirmed, 365 U.S. 569. That decision of the Court is also dispositive of the issue with respect to the measures now at bar.

Furthermore, even if the validity of these measures raised a new issue in this Court, it is clear that the district court correctly held them unconstitutional. This Court has held that the federal courts may properly consider the clear purpose of a statute—revealed on its face or plain from its context—in testing its

* Appellants in No. 868 rely (Jurisdictional Statement, pp. 8–9) upon the decision of the Supreme Court of Louisiana in *Singelmann* v. *Davis* (Jurisdictional Statement, No. 868, App. A, pp. 36–45). That decision is obviously not controlling, as appellants themselves recognize, in the face of this Court's contrary determination. Moreover, while the decision has considerable dictum relating to federal constitutional questions, it explicitly holds only that Act No. 2 is valid under the Louisiana Constitution (see Jurisdictional Statement, No. 868, App. A, p. 39).

constitutionality. "[A] court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. * * * All others can see and understand this. How can we properly close our minds to it?" *Child Labor Tax Case*, 259 U.S. 20, 37.[7] The district court found that this legislation is but another of the recurring attempts of the Louisiana legislature to frustrate and interfere with the court's orders to desegregate the public schools of Orleans Parish.[8] This conclu-

[7] On the relevancy of legislative purpose in situations comparable to that presented here, see also *Korematsu* v. *United States*, 323 U.S. 214, 216, *Miller* v. *Milwaukee*, 272 U.S. 713, 715; *Guinn* v. *United States*, 238 U.S. 347; *Lassiter* v. *Northampton Election Board*, 360 U.S. 45, 53; *Rice* v. *Elmore*, 165 F. 2d 387, 392 (C.A. 4), certiorari denied, 333 U.S. 875; *Home Insurance Co.* v. *New York*, 119 U.S. 129; *Davis* v. *Schnell*, 81 F. Supp. 872 (S.D. Ala.), affirmed, 336 U.S. 933.

[8] The district court said in part (Jurisdictional Statement, No. 868, App. A, pp. 20–21):

"But, even if we were so disposed, we could not ignore the background of the new legislation. These are not the first blooms of a new spring. This litigation is now in its ninth year and the record is a chronology of delay, evasion, obstruction, defiance and reprisal. Nor is the state administration or the legislature which sponsored the measures under consideration a faceless new body. At the behest of the same Governor, the same legislators have recently concluded an unprecedented Fifth Special Session, and the pattern of their labors is more than familiar. Without attending all they have said and done, we must at least notice such of their past actions as have come to our judicial attention, and these are enough to make up a complete catalog of resistance to constitutional authority. No one needs reminding how many efforts have been made in recent weeks alone to oust the elected school board of New Orleans notwithstanding the orders of this court. Against this history, who will say, without strong evidence, that Louisiana's officials have suffered a change of heart and that the measures now before us are harmless details of internal administration?"

sion as to the clear meaning and purpose of the measures is overwhelmingly supported by the materials before the district court. See Jurisdictional Statement, No. 868, App. A, pp. 21–23.

Appellants' contention (Jurisdictional Statement, No. 868, pp. 7–11; No. 967, pp. 15–16) that the composition of the Orleans Parish school board is an internal state matter is no more persuasive here than was a similar contention in a similar context in *Gomillion v. Lightfoot*, 364 U.S. 339. There, the Court admitted "the breadth and importance of * * * the State's political power" "to establish, destroy, or reorganize * * * its political subdivisions" (*id.* at 342). Nevertheless, the Court held that the State's power was not absolute; that it cannot be "used as an instrument for circumventing a federally protected right" (*id.* at 347). Here, the district court found that the three measures involved were an obvious attempt to defeat federal court decrees which had been entered in order to effectuate basic constitutional rights.

2. Appellants also claim (Jurisdictional Statement, No. 868, pp. 11–14; No. 967, pp. 8–10) that the district court erred in authorizing the United States to appear as *amicus curiae* and to file petitions for the injunctions. This contention is clearly without merit.

(*a*) Any question whether the United States can appear as an *amicus curiae* has already been decided in the course of this litigation by this Court. The injunction granted by the district court on December 21, 1960, against Act No. 2 and other measures enacted at the Second Extraordinary Session of the legislature (see *supra*, pp. 4–5) was secured on the petition of the

United States as *amicus curiae*. This participation by the government was made an issue on the appeal to this Court, but the decision of the lower court was affirmed. *Legislature of Louisiana* v. *Bush*, 365 U.S. 569. Similarly, in *Faubus* v. *United States*, 254 F. 2d 797, 804–805 (C.A. 8), certiorari denied, 358 U.S. 829, the court of appeals approved both the district court's invitation to the Attorney General and the United States Attorney to appear as *amici curiae* in order to prevent interference with court orders for school desegregation, and the action of the *amici* in bringing petitions for injunctive relief against such interference.[9]

(*b*) This Court has long held that it is appropriate for a federal court to call on law officers of the United States to serve as *amici curiae*.[10] Indeed, this Court itself has called on a distinguished private lawyer to serve as *amicus curiae* and to present arguments before it. *Granville-Smith* v. *Granville-Smith*, 349 U.S. 1. Here, the district court specifically requested the United States to appear as *amicus curiae* with the right to file pleadings, arguments, evidence, and briefs.

[9] To be sure, in both cases other parties joined with the United States in securing the orders involved. But this does not impair the principle established that the United States, appearing as an *amicus*, can file a petition for an injunction.

[10] *Universal Oil Products Co.* v. *Root Refining Co.*, 328 U.S. 575, 581 ("After all, a federal court can always call upon law officers of the United States to serve as *amici*."); *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 246; *Howard* v. *Illinois Central R. Co.*, 207 U.S. 463, 490; *Northern Securities Co.* v. *United States*, 191 U.S. 555, 556; *The Exchange*, 7 Cranch 116, 118–119; see also *Kasper* v. *Brittain*, 245 F. 2d 92, 96, 97 (C.A. 6), certiorari denied, 355 U.S. 834; *A. B. Dick Co.* v. *Marr*, 197 F. 2d 498, 501–502 (C.A. 2), certiorari denied, 344 U.S. 905.

(*c*) The United States, having been properly invited to enter the case as *amicus,* properly filed the petition for a preliminary injunction, and the court did not err in granting the injunction.

First, we know of no cases which hold that an *amicus curiae* may not file pleadings. But even if we assume *arguendo* that an ordinary *amicus curiae* cannot file motions or petitions, the fact is that the United States did not appear in this case as an ordinary *amicus.* For 5 U.S.C. 306, 309, and 316 specifically provide for the conduct of legal proceedings by officers of the Department of Justice[*] in any suit in which the United States is interested. These statutes grant the government's law officers broad powers to initiate and to participate in proceedings to safeguard the national interest. See *United States* v. *California,* 332 U.S. 19, 27; *Sanitary District of Chicago* v. *United States,* 266 U.S. 405, 425–426; *Kern River Co.* v. *United States,* 257 U.S. 147, 154–155; *United States* v. *San Jacinto Tin Co.,* 125 U.S. 273, 278–280, 284–285; *United States* v. *Throckmorton,* 98 U.S. 61, 70; *Vitamin Technologists, Inc.* v. *Wisconsin Alumni Research Foundation,* 146 F. 2d 941, 946 (C.A. 9). The national interest in this context means more than the pecuniary interest of the government. As the Court held in *In re Debs,* 158 U.S. 564, 584, "The obligations which [the government] is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court." See also *United States* v. *American Bell*

[*] This includes the United States Attorney. See notes on "Transfer of Functions" under 5 U.S.C. 291 and 28 U.S.C. 507.

Telephone Company, 128 U.S. 315, 357–358, 367–368; *United States* v. *U.S. Fidelity and Guaranty Co.*, 106 F. 2d 804, 807 (C.A. 10), reversed on other grounds, 309 U.S. 506. Since the interest of the United States in protecting the integrity of the judicial process is obvious, these statutes give the United States the authority to appear as a party (*i.e.*, an intervenor) in this litigation.

Similarly, these statutes support the power of the district court to confer what are virtually the rights of a party on the United States, even though the United States is designated as an *amicus*. And if the filing of a petition for an injunction is appropriate only for an actual party, it is clear that the district court in effect considered the United States as a party. As the district court said, "Whether 'amicus curiae' is the proper title is a quibble over labels" (Jurisdictional Statement, No. 868, App. A, p. 27). Certainly, such a quibble cannot be conclusive in this litigation.

Appellants' attempt (Jurisdictional Statement, No. 868, pp. 12–14) to undermine these statutes by reliance on the legislative history of proposed "Part III" of the Civil Rights Act of 1957 is totally misplaced. Under "Part III," the Attorney General would have been authorized by Congress to institute school desegregation suits on behalf of would-be plaintiffs who were being deprived of their constitutional rights. Here, the merits of desegregation have long been settled and what is at issue is the right of a federal court to call upon the Attorney General or the United States Attorney to deal with obstruction of court orders.

Second, even if the United States had no right to submit a petition for an injunction, any *amicus* can make such a suggestion which the court can adopt for itself.

Third, even if the United States was not empowered to seek or even suggest this injunction, the court still did not err in granting it. The district court had ample power to grant the injunction *sua sponte*, as an exercise of its ancillary jurisdiction under 28 U.S.C. 1651. See *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co., supra; Local Loan Co.* v. *Hunt*, 292 U.S. 234, 239; *Julian* v. *Central Trust Co.*, 193 U.S. 93, 112; *Root* v. *Woolworth*, 150 U.S. 401, 410–413; *Steelman* v. *All Continent Corp.*, 301 U.S. 278, 288–289; *Dugas* v. *American Surety Co.*, 300 U.S. 414, 428; *Looney* v. *Eastern Texas Railroad Company*, 247 U.S. 214, 221.

CONCLUSION

For the foregoing reasons, we respectfully submit that the questions presented by appellants are clearly unsubstantial and the judgment of the district court should be affirmed.

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as required by the Fourteenth Amendment, were unconstitutional.

2. Whether the United States had standing to seek an injunction against the enforcement of these measures where it had been requested by the district court to participate in the case as *amicus curiae* with the right to initiate proceedings appropriate to preserve the administration of justice and the integrity of the federal judicial process.

STATEMENT

This appeal arises out of the New Orleans school desegregation litigation. The underlying case started in 1952, and, as early as 1956, the district court directed the desegregation of the Orleans Parish public schools. *Bush* v. *Orleans Parish School Board*, 138 F. Supp. 337 (E.D. La.), affirmed, 242 F. 2d 156 (C.A. 5), certiorari denied, 354 U.S. 921. After further protracted litigation, and following the complete failure of local authorities to comply with federal court decrees, the district court, on May 16, 1960, ordered desegregation to begin on a modest scale in September 1960. The deadline for desegregation was thereafter extended to November 1960, and some desegregation actually occurred at that time.

Meanwhile, the Louisiana legislature enacted a series of acts interfering with the orders of the district court. In 1954, the legislature reenacted laws requiring public school segregation (Act No. 555). In 1956, a group of acts was passed purporting to freeze the existing racial status of the Orleans Parish schools and to reserve to the legislature the power

of racial reclassification (Act No. 319). In 1958, the legislature passed statutes providing for the closing of schools under a desegregation order (Act No. 256). In its 1960 session, the legislature enacted a large number of statutes to prevent compliance with the district court's desegregation order of May 16, 1960. Four of these measures—Acts Nos. 333, 495, 496, and 542—and the three earlier acts referred to above were declared unconstitutional by a three-judge district court on August 27, 1960. *Bush* v. *Orleans Parish School Board,* 187 F. Supp. 42 (E.D. La.), affirmed, 365 U.S. 569 (No. 613, this Term).

On November 14, 1960, the Orleans Parish school board began good faith compliance with the orders of the district court, and four Negro first grade children began to attend the formerly white schools of the parish. Immediately thereafter, at the First Extraordinary Session of 1960, the legislature passed an "interposition" statute (Act No. 2), which a three-judge district court subsequently held was unconstitutional. *United States* v. *Louisiana,* 188 F. Supp. 916 (E.D. La.), stay denied, 364 U.S. 500, affirmed *sub nom. Orleans Parish School Board* v. *Bush,* 365 U.S. 569 (No. 589, this Term). In addition, the legislature enacted laws which, *inter alia,* purported: (1) to confer the functions of the Orleans Parish school board on the legislature (Act No. 17);[1] (2) to provide

[1] House Concurrent Resolution No. 10 established an eight-man legislative committee to manage the Orleans Parish schools. Later, the legislative committee was transformed into a purely investigative body, with the legislature itself assuming the functions of the Orleans Parish school board (House Concurrent Resolution No. 17).